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No. 80-1893

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAY HILERY DEWEESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the boarding of an American flag vessel on the high seas and the search of its ice hold by Coast Guard officers violated the Fourth Amendment.

2. Whether the district court properly permitted the testimony of a government witness whose name was not timely furnished under the court's discovery order.

3. Whether the evidence was sufficient to show that petitioner was engaged in a conspiracy to import marijuana into the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-17) is reported at 632 F. 2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1980. A petition for rehearing was denied on March 11, 1981 (Pet. App. 39-40). The petition for a writ of certiorari was filed on May 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 963. He was sentenced to five years'

imprisonment to be followed by a seven-year term of special parole.[1] The court of appeals affirmed (Pet. App. 2-17).

The evidence at trial is summarized in the opinion below (Pet. App. 7-8). It showed that on May 14, 1979, the Coast Guard Cutter POINT LOBOS, on patrol near the Straits of Yucatan[2] some 250 miles from the United States, sighted a large shrimp boat with the name COWBOY and the home port of "Mobile" painted on its stern (A Tr. 67, 75-80, 94-95). After closing to a distance of 25 yards from the COWBOY the POINT LOBOS requested over its loudspeaker that the COWBOY stop for a boarding (A Tr. 82).

The COWBOY stopped its engines and three Coast Guard officers boarded the boat. Petitioner identified himself as the captain. Petty Officer Helms explained that he was checking the COWBOY for compliance with United States laws (A Tr. 82; B Tr. 12-13). In response to Helms' request, petitioner produced documentation papers identifying the COWBOY as an American flag ship but could produce no permits allowing the vessel to shrimp in foreign waters (B Tr. 30-31). An inspection of the vessel revealed one minor safety violation and the absence of the required oil pollution placard (B Tr. 15-16).

During the inspection the officers in the boarding party noticed that none of the COWBOY's nets was in the water, and that the rigging for the nets was clean and did not appear to have ever been used (A Tr. 79; B Tr. 54, 62). In

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[1]We note that petitioner received a special parole term as part of his sentence for conspiracy to import marijuana. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), however, this Court held that a special parole term may not be imposed for a narcotics conspiracy offense. Petitioner's remedy is to move the district court for correction of sentence pursuant to Fed. R. Crim. P. 35.

[2]The Straits of Yucatan is the body of water separating the western tip of Cuba and the eastern tip of Mexico, connecting the Caribbean Sea and the Gulf of Mexico.

addition, the metal strips on the boards used for dragging the nets on the ocean floor were in a rusty condition, indicating that they had not been used recently (B Tr. 54-57).

After inspecting the COWBOY's engine room, Officer Helms asked petitioner if he could take a look at the vessel's ice hold, where the catch is generally stored. Petitioner responded, "Sure, but you're not going to like what you find" (B Tr. 17). As petitioner and a crew member lifted the hatch to the ice hold, the Coast Guard officers on the deck observed a large number of marijuana bales in the hold; they then placed petitioner and his crew under arrest (B Tr. 20-23). A subsequent search of the vessel uncovered a total of more than 20 tons of marijuana, with a retail value of approximately $8 million (B Tr. 64, 84-85).

ARGUMENT

1. Petitioner argues (Pet. 4-17) that the high seas boarding of his vessel and the subsequent search of its hold violated his Fourth Amendment rights. First, he contends that 14 U.S.C. 89(a), which authorizes the Coast Guard to board United States flag vessels on the high seas and to conduct safety and document inspections, is unconstitutional on its face. Second, he contends that the stop and boarding in this case were unlawful in the absence of reasonable suspicion that the vessel was operated in violation of United States laws. Third, petitioner argues that even if the Coast Guard officers properly boarded his boat, the search of the hold was unlawful because it was conducted without either probable cause or voluntary consent. These contentions are without merit and do not warrant this Court's review.

a. There is no occasion for this Court to consider the facial constitutionality of 14 U.S.C. 89(a). To begin with, every court that has considered the matter has upheld the constitutionality of the statute. See *United States* v. *Arra*,

630 F. 2d 836, 840-842 (1st Cir. 1980); *United States* v. *Hilton*, 619 F. 2d 127, 131-133 (1st Cir. 1980), cert. denied, No. 79-1732 (Oct. 6, 1980); *United States* v. *Williams*, 617 F. 2d 1063, 1079-1082, 1085-1086 (5th Cir. 1980) (en banc); *United States* v. *Erwin*, 602 F. 2d 1183, 1184 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); *United States* v. *Warren*, 578 F. 2d 1058, 1064 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). Moreover, as this Court observed in *Sibron* v. *New York*, 392 U.S. 40, 59 (1968), the constitutional validity of a warrantless search or seizure "is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." Hence, we turn to consider whether the actual boarding and search in this case were reasonable under the Fourth Amendment.

b. As to the boarding, the courts of appeals have uniformly upheld the validity of suspicionless boardings of American vessels on the high seas by Coast Guard officers acting under the authority of Section 89(a) in circumstances similar to those here, and this Court has consistently declined to review these decisions. See, *e.g.*, *United States* v. *Hilton*, *supra*; *United States* v. *Harper*, 617 F. 2d 35, 37-39 (4th Cir. 1980), cert. denied, No. 79-1863 (Oct. 6, 1980); *United States* v. *Warren*, *supra*.[3] There is no greater reason to grant review here.

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[3]Contrary to petitioner's suggestion (Pet. 12-14), the decision in this case does not conflict with *United States* v. *Piner*, 608 F. 2d 358 (9th Cir. 1979). In *Piner*, the court held that the Fourth Amendment was violated by the warrantless and suspicionless boarding of a pleasure vessel by Coast Guard personnel for a safety and documentation inspection, but only because in that case the boarding took place after dark. The court assumed arguendo that "the governmental interest in securing compliance with safety regulations outweighs the intrusion on privacy encountered in the ordinary boarding" (*id.* at 361), but held that the governmental interest could be sufficiently protected by random

Petitioner contends (Pet. 12) that the boarding of his vessel is closely analogous to the investigatory stops of automobiles and individuals in street encounters, and, like such intrusions, must be justified by reasonable suspicion. See, *e.g.*, *United States* v. *Cortez*, No. 79-404 (Jan. 21, 1981); *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), slip op. 4-9. But in light of the important governmental interests in enforcing the numerous laws peculiar to vessels on the high seas, the practical difficulties involved in law enforcement at sea, and the reduced expectations of privacy of those on board American flag vessels because of the pervasive nature and long history of maritime regulation, the courts of appeals have correctly held that the limited intrusion upon privacy interests occasioned by boardings conducted under the authority of 14 U.S.C. 89(a) is not unreasonable within the meaning of the Fourth Amendment.

c. Petitioner's challenge to the search of the vessel's ice hold must also fail, because, as the court below held (Pet. App. 12 n.1), petitioner freely consented to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The record shows that in response to Officer Helms' question whether he could look inside the ice hold, petitioner said "[s]ure" (B Tr. 17). There is nothing in the record to support petitioner's assertion (Pet. 16-17) that the Coast Guard officers coerced petitioner to consent through a show of

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daytime boardings and did not justify the increased "subjective intrusion" of suspicionless boardings of vessels after dark. Since the boarding in this case took place during daylight hours, and since this was a commercial fishing boat and not a pleasure vessel, there is no conflict with *Piner*.

force or through a claim of authority to search without consent.[4]

2. Petitioner next argues (Pet. 18-22) that the government's failure to disclose the name of an expert witness several weeks prior to trial, as required by a pretrial discovery order, deprived him of effective assistance of counsel and his right to cross-examine that witness. The court of appeals correctly held (Pet. App. 16-17), however, that petitioner had failed to demonstrate prejudice and that therefore any error in admitting the witness's testimony was harmless. In any event, this harmless error issue is not of such general importance as to warrant this Court's review.

Prior to trial, on July 2, 1979, the district court entered an omnibus discovery order which required both parties to exchange, by July 20, 1979, lists of potential witnesses; the order did not require the disclosure of the substance of the witnesses' testimony.[5] On July 19 and again on July 31, the

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[4]In addition, the court of appeals properly concluded (Pet. App. 9-12) that petitioner did not make a sufficient showing that his legitimate expectations of privacy were violated by the search of the hold. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *Rakas* v. *Illinois*, 429 U.S. 128 (1978). We agree with the view of nine judges of the Fifth Circuit that, "[b]ecause maritime activities are pervasively regulated, and because a number of the regulatory laws permit government officials to enter the holds of vessels * * * there is no legitimate privacy interest in any part of a vessel's hold." *United States* v. *Williams*, *supra*, 617 F. 2d at 1087 n.25. See, *e.g.*, *United States* v. *Willis*, 639 F. 2d 1335, 1337 (5th Cir. 1981); *United States* v. *Raub*, 637 F. 2d 1205 (9th Cir. 1980), cert. denied, No. 80-5096 (Oct. 20, 1980). Petitioner notes (Pet. 11) the "possibilit[y]" that a shrimp boat's captain might lock the hatches leading to the hold and retain sole possession of the key. Even assuming that this factor might make a difference to the Fourth Amendment analysis, petitioner does not and could not suggest that it is present here.

[5]We note our view that federal district courts have no inherent power to order the parties to a criminal case to identify their witnesses in advance of trial. Such power must derive from a statute or rule. While

government submitted witness lists, but it omitted the name of a potential expert witness on navigation, Coast Guard Commander Gehring. One day before trial, the government notified petitioner that Commander Gehring would testify and supplied petitioner with charts the witness would utilize during his testimony (see A Tr. 18-19).

Commander Gehring testified two days later as an expert in navigation and oceanography. In his testimony, he concluded, based on his knowledge of ocean currents, weather, bottom topography and tides, that the COWBOY was en route to a United States port at the time of the Coast Guard boarding (B Tr. 142). The COWBOY's headings indicated that it was positioned to take advantage of currents that would take it north to the United States, not to alternative destinations such as Mexico, Cuba or the Bahamas (B Tr. 130). Gehring also stated that the absence of detailed charts for any port outside of Mobile Bay, Alabama and the West Coast of Florida would have prevented the COWBOY from safely entering foreign ports. Defense counsel cross-examined Gehring at length on the scientific bases for his opinion.[6]

In these circumstances, petitioner has failed to make the required showing of prejudice to warrant reversal. See *United States* v. *Phillips*, 585 F. 2d 745, 747 (5th Cir. 1978). Petitioner knew that the indictment charged him with conspiring to import drugs into the United States, and he was therefore aware that the government would have to prove,

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the 1974 revisions to the Federal Rules of Criminal Procedure contained a proposal to empower district courts to require reciprocal pretrial disclosure of witness lists, Congress struck this provision from Rule 16 as enacted. See H.R. Conf. Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975). But see *United States* v. *Cannone*, 528 F. 2d 296 (2d Cir. 1975).

[6]The cross-examination of Commander Gehring covers 52 pages of the trial transcript.

through expert testimony or otherwise, that his planned destination was a port within the United States. Petitioner could not have been prejudiced simply because he did not know the name of the particular witness who would testify on this obvious and essential point. And even if the government had furnished Gehring's name to petitioner by the required date, petitioner would have had no indication of the substance of Gehring's testimony and, hence, would have had no additional reason to study wind and ocean currents, weather conditions, and other factors relevant to proving the COWBOY's probable destination. Petitioner was informed of Gehring's status as an expert and was furnished with a copy of the witness's nautical chart two days before Gehring's testimony. In sum, it could not have come as a surprise to petitioner that there would be destination testimony, he had two days to focus specifically upon Gehring's forthcoming testimony, and he would have had no more notice of Gehring's expertise even if the government had complied with the discovery order. Accordingly, there is no reason to believe that petitioner's cross-examination of Gehring would have been any more thorough or effective than the one that was actually presented.

3. Petitioner finally contends (Pet. 23-25) that the government presented insufficient evidence to show that he conspired to import marijuana into the United States. The court of appeals correctly rejected this fact-bound claim (Pet. App. 13-15).

The evidence demonstrated that petitioner and four other crew members had set sail from Mobile, Alabama in March 1979, two months prior to the May 14 Coast Guard boarding. Despite its two months at sea, the COWBOY's shrimping nets and equipment appeared to be unused. In addition, the crew could produce no permits allowing them to fish in

foreign waters. A search of the hold uncovered 503 bales of marijuana. The jury could properly have concluded that the "length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship between the captain and his crew" (Pet. App. 14-15), coupled with the evidence that the crew had not been fishing, established that petitioner conspired with other persons to import the marijuana. See *United States* v. *Alfrey*, 612 F. 2d 180, 185-186 (5th Cir. 1980), cert. denied, No. 80-5158 (Oct. 20, 1980) (two man crew had necessarily close relationship with captain on a small vessel); *United States* v. *Laughman*, 618 F. 2d 1067, 1074-1075 (4th Cir. 1980) (presence of two tons of marijuana in small boat could hardly have escaped attention of crew members); *United States* v. *Gomez*, 529 F. 2d 412, 418-419 (5th Cir. 1976) (the large quantity of marijuana involved—460 pounds—would require the assistance of others to unload).

Moreover, Commander Gehring's testimony was sufficient to show that the COWBOY's destination was an American port. As the court of appeals correctly held (Pet. App. 14), a reasonable jury could have concluded, based on Gehring's description of the boat's course and the prevailing currents it was utilizing, that the COWBOY was headed for the United States. At the time of its initial sighting, the COWBOY was headed in a northerly direction and was sailing near the axis of the fastest available current that would carry it north. The vessel's only detailed navigational charts, which were necessary to facilitate safe entry into port, were for a small island near the Columbian-Nicaraguan coast, for Mobile Bay, Alabama, and for Tampa Bay and Tarpon Springs, Florida. The absence of detailed charts for Mexico, Cuba or the Bahamas would have prevented the COWBOY from safely entering those foreign ports. This circumstantial evidence sufficiently demonstrated that the COWBOY was en route to American waters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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